UNITED STATES DISTRICT COURT—SOUTHERN DISTRICT OF OHIO.

Harrison Antinarcotic Law—Only Physicians who are Engaged in the Legitimate Practice of Their Profession are Entitled to Register.

TUCKER v. WILLIAMSON. (Dec. 7, 1915.)

A physician who does not personally attend his patients, but in most instances prescribes for them upon their written statements, and who prescribes and distributes to all the same preparation, is not engaged in the legitimate practice of medicine, and is not entitled to register under the Harrison antinarcotic law.

The ruling of the Commissioner of Internal Revenue which limits the right to register under the Harrison antinarcotic law to those physicians who are engaged in the legitimate practice of their profession, and which denies the right of registration to physicians who prescribe or dispense narcotic drugs or preparations on receipt of mail orders from so-called patients, is valid.

The Harrison antinarcotic law does not make an exception of preparations in which the cocaine is in the form of the decomposition products of cocaine and not as cocaine per se, or in which the cocaine is denatured as to its habit-forming and habit-satisfying qualities. The statute prohibits the dispensing of the drug by a person not duly authorized to do so, and there is no exemption on account of the form in which the drug exists or is prescribed.

Suit in equity was brought by Nathan Tucker and William B. Robinson against Beriah E. Williamson, collector of internal revenue for the eleventh district of Ohio, asking for a restraining order and an injunction preventing the collector from enforcing the provisions of the Harrison antinarcotic law and the ruling of the Commissioner of Internal Revenue.

[229 Federal Reporter, 201.]

A motion is made to dismiss the bill, whose averments, as far as need be noted, are as follows: Both of the plaintiffs are graduates of medical schools. Each is a member of his county and State medical society. One has been engaged for 48 years as a physician in lawful practice and the other for 19 years. Both are duly licensed to practice medicine in Ohio, and each has registered as required by the act of Congress of December 17, 1914, known as the Harrison narcotic law. Each has paid the special tax required by that law. In the course of their professional practice only they have been and are prescribing for, dispensing, and distributing to various patients, numbering many thousands, and residing in various States, a certain medicine prepared by them for the relief of asthma and hay fever, which medicinal preparation contains cocaine. They do not personally attend all of their patients for and to whom they thus prescribe, dispense, and distribute such preparation, but in most instances prescribe for such patients and dispense and distribute such medicinal preparation to them upon the written statements of such patients to plaintiffs, describing and setting forth their respective symptoms and conditions. Since March 1, 1915, and for many years prior thereto, plaintiffs have kept a complete record showing the amount of all the drugs mentioned in section 1 of the act in question, dispensed or distributed, the date thereof, and the name and address of each patient to whom such drugs have been dispensed or distributed, and still keep such record as required by the act. The amount of cocaine in each dose does not exceed 0.001 of a grain. The preparation is distinctly alkaline. The greater per cent of cocaine used in it is in the form of the decomposition products of cocaine, and not as cocaine per se, such cocaine being denatured as to its habit-forming or habit-satisfying qualities. As partners and jointly the plaintiffs, by means of the order forms prescribed by the act, have in their possession cocaine, for the sole purpose of its use, sale, and distribution by them and each of them in the lawful practice of their profession as physicians, and have made and preserved duplicates of such orders upon the form issued for that purpose by the Commissioner of Internal Revenue.

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The plaintiffs, on September 10, 1915, were notified by the Acting Commissioner of Internal Revenue that their practice of sending out a preparation containing cocaine

to patients which such physicians have never seen is considered by such commissioner to be an illegitimate practice of medicine and in direct violation of the intents and purposes of the Harrison antinarcotic law, particularly of section 2, and should be stopped, and that a copy of his notification had been furnished to the district attorney and the revenue agents.

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It is charged that * * * the act in question is unconstitutional and void as applied to the plaintiffs or either of them in connection with their practice as physicians in that it attempts to regulate the prescribing, dispensing, and distributing of the drugs mentioned in it within the State of Ohio. The order of the commissioner of June 10, 1915 (hereinafter mentioned), is also alleged to be without authority of law and void.

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The ruling announced by the Commissioner of Internal Revenue and the Secretary of the Treasury on June 10, 1915, and of which complaint is made, is, in substance, as stated in this paragraph, and is as follows: The limitation of registration to certain named persons indicates the vesting of a power of discretion in collectors of internal revenue as to who shall register and from whom the special tax may be received. Persons not legitimately engaged in the exercise of their trade or profession can not legally register under the terms of the act. From the express language of the act, a physician can register and dispense the drugs embraced in the act "in the course of his professional practice only." He can prescribe such drugs when he "has been employed to prescribe for the particular patient receiving such drugs," and upon whom he "shall personally attend in the course of his professional practice only." Such prescriptions must be made "in the legitimate practice of his profession," and then only when "employed to prescribe for the particular person (patient) receiving such drugs." The duties of collectors of internal revenue do not end, under the provisions of the act, with simple registration. If parties secure registration through misrepresentation or fraud, such registration is null and void, and does not protect them from prosecution for the illegal use of the drugs, and it is the duty of collectors, when such cases are discovered, to investigate the same, and, when the law has been violated in line with the foregoing, to seize and proceed to forfeit the prohibited drugs illegally in possession of such parties and recommend such persons to the district attorney for indictment and prosecution. The collectors were informed that the foregoing "has special application to those persons who, registering as physicians, prescribe or distribute narcotic drugs or preparations on receipt of mail orders received from so-called patients, or who, under the laws of the State or under municipal regulation, are not permitted to practice medicine."

SATER, District Judge:

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In view of section 1286, G. C. Ohio, the plaintiffs are engaged in the practice of medicine. Under the State rule, if a person examines patients, diagnoses their diseases, and then prescribes and sells his own proprietary remedies, he is practicing medicine, notwithstanding his ostensible and apparent motive may be the sale of his medicines. (Taylor's Law in Relation to Physicians, 39; State *v.* Van Doren, 109 N. C., 684; 14 S. E., 32; Wharton & Stillé's Med. Jur., vol. 3, sec. 452.) The tendency on the part of the States is to extend rather than to restrict the definition of the term "practicing medicine" (Taylor, supra, 39), and for the manifest purpose of protecting their citizens and rendering amenable to law all practitioners who violate its provisions or are guilty of imposition or other reprehensible conduct.

Legislation by the States regarding the practice of medicine is a valid exercise of the police power. (Hawker *v.* N. Y., 170 U. S., 189, 191–193; 18 Sup. Ct., 573; 42 L. Ed., 1002; Reetz *v.* Michigan, 188 U. S., 505, 506; 23 Sup. Ct., 390; 47 L. Ed., 563;

Collins *v.* Texas, 223 U. S., 288; 32 Sup. Ct., 286; 56 L. Ed., 439; Meffert *v.* State Board of Medical Registration, 66 Kans., 710; 72 Pac., 247; 1 L. R. A. (N. S.), 811, affirmed 195 U. S., 625; 25 Sup. Ct., 790; 49 L. Ed., 350.) The exaction by the National Government, however, of a license, as a condition for the sale, dispensing, or distribution of drugs, like that for the sale of intoxicating liquor, is not an exercise of the police power, but is for the purpose of revenue. (Re Heff, 197 U. S., 488, 505; 25 Sup. Ct., 506; 49 L. Ed., 848.) A license to dispense the drugs named in the act must be regarded as nothing more than a mere form of imposing a tax and as implying nothing more, except that the licensee shall not be subject to the penalties of the law if he pays such tax and conforms to legal requirements. (License Tax Cases, 5 Wall., 462, 471; 18 L. Ed., 497.)

The only physician that may under section 2 (a) lawfully dispense or distribute the drug in question is one who is registered and who acts in the course of his professional practice only. He may not—section 2 (d)—obtain it by means of the prescribed order forms for any purpose other than the use, sale, or distribution of it in the legitimate practice of his profession. That he must in each instance in which he dispenses or distributes the drug be employed to prescribe for the particular patient receiving such drug is necessarily implied from the pertinent provisions of the act and the purpose to be accomplished by it. He may not engage in the business of selling, unless he sells it in filling his own prescriptions, for the sale of it is, generally speaking, the part of the druggist. He must act strictly within the line of actual employment in a legitimate and professional practice only, in which (adopting the definition of the practice of medicine as found in Underwood *v.* Scott, 43 Kans., 714; 23 Pac., 942) he personally judges (diagnoses) the nature, character, and symptoms of the disease, determines the proper remedy for it, and prescribes the application of the remedy to the disease. Personal investigation precedes and personal supervision accompanies the prescribing. The remedy is to be adapted to the disease and wants of the particular patient. That a physician may not prescribe for other than the particular patient that employs him and that is to receive the drug follows from the language and import of sections 4 and 8. The proviso of section 4 makes lawful the sending, shipping, carrying, or delivery of the drug (1) by common carriers engaged in transporting it, and (2) by any employee (acting within the scope of his employment) of any person who shall have registered and paid the special tax; but that section, when it treats of physicians, deals only with the delivery of the drug and permits its delivery by a person (an individual) only when it has been prescribed or dispensed by a registered physician who has been employed to prescribe for the particular patient who is to receive such drug. The law contemplates that there shall be no promiscuous or covert passing around of the drug to persons who have not employed the physician and received it on his prescription. The proviso of section 8, whose validity and scope need not now be considered, makes possession of the drug by an unregistered person who has not paid the tax, other than an employee of a registered person, or a nurse under the supervision of a registered physician, presumptive evidence of a violation of the act, unless such possessor shall have obtained a prescription made in good faith from a registered physician.

The regulation promulgated by the Treasury Department that a physician must be actually absent from his office and in personal attendance upon a patient in order to come within the exemption of section 2 (a) accords with the design that a physician shall maintain supervision over the patient for whom he prescribes. One of the definitions of "attend" (Latin, "attendere") given in Webster's International Dictionary is: "To visit professionally, as a physician." The department thus places (and, I am disposed to think, rightfully so) a more restricted meaning on personal attendance than the courts have placed on medical attendance, it being held that to constitute the latter it is not requisite that the physician should attend the patient at his home and that an attendance at his office is sufficient. (Cushman *v.* Insurance Co., 70 N. Y., 72;

Gilligan *v.* Royal Arcanum, 26 Ohio Cir. Ct., 42, 43.) It is by personal attendance that the greater part of the business of a regularly practicing general practitioner is done. The personal attendance clause, therefore, covers the majority of all of the cases in which the drug is dispensed or distributed by such a physician. Its effect is to increase the inconvenience and difficulty, and even the expense, of procuring the drug. In harmony with this view is the provision of section 2 (b), which does not permit the filling of prescriptions unless they are written and signed and dated as of the day on which they are signed. The refilling of prescriptions is not permissible. If, instead of personal attendance on a patient by the physician, the patient calls on the physician at his office for treatment, in which event such physician is required to make a record of the drugs mentioned in the act which he dispenses or distributes, the opportunity is afforded of personally diagnosing, studying, supervising, and prescribing for such patient. If a regularly practicing physician may prescribe without seeing his patient, it is in occasional instances only.

The responsibility cast upon the physician is great, and the law consequently exacts of him a high degree of integrity—practices which are both professional and legitimate. Even a layman knows that the diagnosis of diseases has in recent years assumed increased and increasing importance for the purpose of determining and removing their causes. The ascertainment of the blood pressure, the analysis of the blood, urine, and stomach contents, the employment of the X ray and of other appliances and modes of examination for the determination of the physical condition of patients are so usual and so much more assuring than a patient's recital of what may be merely subjective symptoms that skillful and conscientious physicians have come to use, and intelligent people have come to expect, an exaction of the full history of each case and the use of scientific methods in determining the presence or absence of disease and its stage of advancement. Such methods enable the physician to work with greater precision to remove the causes of disease. If he acts only on the patient's statement, however honestly made, he may be misled or treat a symptom and not the disease itself, whether that statement be oral or in writing, and if in writing, and the patient be not seen at all, the prescription sent may not only be an inappropriate remedy, but may reach another for whom the physician did not intend it and of whom he never heard.

In the enactment of legislation the lawmaking body may take into account the advance of learning, and provide for the public health and safety by such reasonable and proper measures as increased knowledge may suggest (State *v.* Gravett, 65 Ohio St., 289, 300; 62 N. E., 325; 55 L. R. A., 791; 87 Am. St. Rep., 605), and may impose new conditions as prerequisite to the practice of medicine as new modes of treating disease are discovered. The statute must be construed with reference to known usages and modes of transacting business (Shoemaker *v.* Goshen Township, 14 Ohio St., 569, 584), as well as the history of the times (Preston *v.* Bowder, 1 Wheat., 115, 120, 121; 4 L. Ed., 50), and for the benefit of the community at large (Allen *v.* Little, 5 Ohio, 66, 72). Although a revenue measure, the provisions of the act defining who may practice under it tend to reduce to a minimum (if it does not wholly eliminate) the number of prescriptions for unfortunate cocaine addicts which are not made in cases of personal supervision, when the patient calls on the physician or the physician on the patient. The physician must, if practicable, prescribe with reference to knowledge personally acquired by seeing his patient. To prescribe, in most instances, for absent patients, on their written statements describing their respective symptoms and conditions, and in every instance to send the same medicinal preparation—a sort of proprietary medicine— is to reverse the policy of the law, make an exception the rule, open the door to fraud, and frequently to furnish treatment which may be hurtful or wholly ineffectual. That the purpose of the law may not fail, the act forbids the registration of and imposes penalties upon physicians who engage in other than legitimate and professional practice, and has cast, or at least has attempted to cast,

upon the Commissioner of Internal Revenue and the Secretary of the Treasury the power of defining in what such practice consists.

The provisions of the act that are directed toward physicians are also made applicable to dentists and veterinary surgeons. A veterinarian, as defined by the Century Dictionary, is:

> One who practices the art of treating diseases and injuries of domestic animals, surgically or medically.

It would seem that no veterinarian can legitimately or in the course of his professional practice only prescribe for a human being, because his patients are domestic animals. The veterinarian of necessity almost always treats his patients when away from his office and when personally attending them. The advance made in dentistry in recent years requires the giving of prescriptions to a considerable extent in dental surgery and for the removal of the causes of diseases of the teeth and mouth, but cases of dental surgery are usually treated at the hospitals, although prescriptions for the removal of the causes of disease are ordinarily given at the dentist's office, and of these a record must be kept. If classifying dentists and veterinarians with physicians is a fact to be considered in construing the act, it does not require a modification of the views above expressed, for the reason that personal examination into and personal supervision of each case is necessarily the rule, and prescribing for a patient in his absence is the exception.

If the above conclusions be correct, that the law contemplates prescribing or distributing of the drugs mentioned in the act only in case of the personal attendance of physicians on their patients, or of the personal visits of patients to their physicians, save in exceptional instances, does a physician engage in "the legitimate practice of his profession," or prescribe the drug "in the course of his professional practice only," who does not see most of his patients, who bases most of his prescriptions on their written statements sent to him through the mails, and who prescribes the same remedy for all alike? Who determines what practices are legitimate and professional? The law does not in express language state, but does it do so by necessary implication? The deference to be paid to a departmental ruling and construction of the law is defined in Smythe *v.* Fiske (23 Wall., 374, 382; 23 L. Ed., 47); U. S. *v.* Moore (95 U. S., 760, 763; 24 L. Ed., 588); Nunn *v.* Wm. Gerst Brewing Co., 99 Fed., 939, 942 (C. C. A., 6); 40 C. C. A., 190); Swift & Co. *v.* U. S. (105, U. S. 691, 695; 26 L. Ed., 1108); Fairbank *v.* U. S., 181 U. S., 283, 310, 311; 21 Sup. Ct., 648; 45 L. Ed., 862); Merrit *v.* Cameron (137 U. S., 542, 552; 11 Sup. Ct., 174; 34 L. Ed., 772; 26 Cyc., 1602 et seq.).

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Congress established a board, as it were, with powers akin to those of a board of medical examiners, or a board of school examiners, or a board of equalization, to determine what applicants possess the requisite qualifications for registration and practice under the narcotic law. In unmistakable language it indicated that their practice must be legitimate and professional. It did not prescribe, as it might have done, the standard of qualifications. It did, however, what under the authority of the Lemon case [Coopersville Creamery Co. *v.* Lemon, 163 Fed., 145; 89 C. C. A., 595] it was altogether competent for it to do—it declared that the practice which should confer upon or deny the physician the right to register and dispense the specified drugs must be legitimate and professional. It was the design of Congress that standards of professional qualifications should be provided to render the law effective for accomplishing its purpose. The regulation fulfills the purpose of the law, and it can not therefore be said to be an addition to it. (U. S. *v.* Antikamnia Co., 231 U. S., 654, 667; 58 L. Ed., 419; Ann. Cas., 1915A, 49.)

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It follows from the foregoing that collectors of internal revenue should, in licensing physicians, enforce the departmental regulation against those doing a mail-order business as fully as any other valid regulation promulgated by constituted authority;

and that physicians permitted to practice under the act who conduct their business in an illegitimate or unprofessional manner subject themselves to the penalties of the law.

In the Lemon case it was said that if the regulation there under consideration had not the force of law as a conclusive determination of fact it nevertheless furnished a working rule for the guidance of officers and the information of manufacturers, and on the trial of a manufacturer of butter, from whom the tax was exacted on butter alleged to have more than 16 per cent of water in it, a court will commit no error if it submits to a jury the question as to whether such a percentage of water is abnormal. It would not, therefore, be error for a trial judge, should he elect so to do, to determine, in a case triable to himself, or to submit to a jury, in a proper case for its determination, the question of fact whether an accused party's methods of doing business debar him from practice under the law.

Reliance is had by plaintiffs on the averment that the greater part of the cocaine used in their preparation is in the form of the decomposition products of cocaine and not as cocaine per se, and that the cocaine is denatured as to its habit-forming and habit-satisfying qualities. The statute, however, runs against the dispensing of the drug by a person not duly authorized to do so. There is no exemption on account of the form in which the drug exists or is prescribed.

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The motion to dismiss is sustained, and the bill is dismissed.